

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-2160

IN THE UNITED STATES

JAN 3 1977

COURT OF APPEALS

FOR THE SECOND CIRCUIT, NEW YORK

UNITED STATES OF AMERICA

vs.

MILTON MILLS

CR: 75-331

CIV. NO: 76-1116

Brief and Appendix

CERTIFICATION OF SERVICE

B
P/S

THIS IS TO CERTIFY:

THAT A COPY OF THIS NOTICE, APPELLANTS' BRIEF ON APPEAL, WAS
CAUSED TO BE MAILED TO THE BELOW PARTIES ON THIS 9 DAY OF DECEMBER 1976:

HON. JUDGE LAWRENCE W. PIERCE

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK, N.Y. 10007

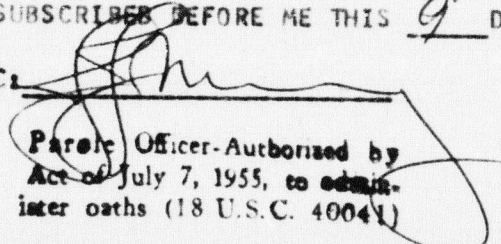
UNITED STATES DISTRICT ATTORNEY'S OFFICE

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK, N.Y. 10007

SWORN TO AND SUBSCRIBED BEFORE ME THIS 9th DAY OF DECEMBER :

NOTARY PUBLIC: 

Notary Officer-Authorized by
Act of July 7, 1955, to admin-
ister oaths (18 U.S.C. 4004)

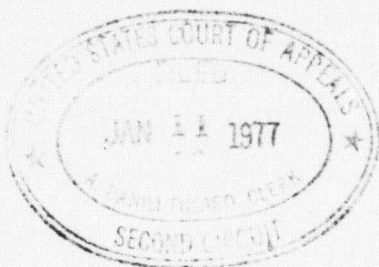
Milton Mills
MILTON MILLS: PRO SE: APPELLANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS ⁴9 DAY OF DECEMBER :

NOTARY PUBLIC: [Signature]

Parole Officer-Authorized by
Act of July 7, 1955, to admin-
ister oaths (18 U.S.C. 40041)

Milton Mills
MILTON MILLS: PRO SE: APPELLANT



JK-3100

IN THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT, NEW YORK

UNITED STATES OF AMERICA

vs.

MILTON MILLS

S.D. CR: 75-331

CIV. NO: 76-1116

APPELLANTS' BRIEF ON APPEAL

TO THE HONORABLE JUSTICES PRESIDING IN THE ABOVE SAID COURT, APPELLANT RESPECTFULLY MOVES TO FILE THIS APPELLANTS' BRIEF IN SUPPORT OF APPEAL FROM THE JUDGEMENT AND ORDER ENTERED IN BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DENYING AND DISMISSING HIS MOTION PURSUANT TO TITLE 28 U.S.C. SECTION 2255, ON SEPTEMBER 21, 1976.

ISSUE NOW BEFORE THE COURT
FOR CONSIDERATION

WHETHER APPELLANT WAS AFFORDED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL, WHO DISCLOSED TO APPELLANT A PLEA BARGAN THAT WAS ALLEGEDLY
A MADE IN RETURN FOR APPELLANTS' PLEA OF GUILTY, YET UNKEPT AFTER SUCH PLEA
WAS ENTERED.

WHETHER APPELLANT WAS AFFORDED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL, WHO DISCLOSED TO APPELLANT A PLEA BARGAIN THAT WAS ALLEGEDLY A MADE IN RETURN FOR APPELLANTS' PLEA OF GUILTY, YET UNKEPT AFTER SUCH PLEA WAS ENTERED.

STATEMENT OF FACTS

PETITIONER WAS ARRESTED MARCH 26, 1975, FOR VIOLATION OF SECTION 371, 2113 (d) U.S.C. AN INDICTMENT WAS RETURNED AGAINST HIM FROM THE SOUTHERN DISTRICT OF NEW YORK AND A PLEA OF NOT GUILTY WAS ENTERED MARCH 27, 1975. ON MAY 29, 1975 APPELLANT APPEARED BEFORE THE HONORABLE JUDGE LAWRENCE W. PIERCE FOR A CHANGE OF PLEA AND SENTENCING. AT THAT TIME HE MADE IT KNOWN THAT A PLEA BARGAINING HAD BEEN DISCUSSED BETWEEN HIS ATTORNEY AND THE AUTHORITIES. TESTIMONY WAS HEARD AND SENTENCING WAS DEFERRED PENDING THE TAKING OF A PRESENTENCE REPORT. ON JULY 15, 1975, THE APPELLANT AGAIN APPEARED BEFORE THE DISTRICT COURT AND REVEALED ~~XXX~~ THAT IT WAS CONVEYED TO HIM A PLEA BARGAIN WAS MADE IN EXCHANGE FOR HIS PLEA OF GUILTY. TR. 4-5 JULY 15, 1975). ALL ATTORNEYS NOW CLAIM NO KNOWLEDGE OF OR THAT A PLEA BARGAIN WAS MADE IN RETURN FOR APPELLANTS' PLEA OF GUILTY.

ARGUMENT OF ISSUE IN SUPPORT OF APPEAL

APPELLANTS' ATTORNEY, MR. MILTON ROSENBERG (ROSENGERG), MENTIONED TO THE COURT IT WAS DISCUSSED AT TIME OF PRIOR SENTENCING (MAY 29, 1975), THE TAKING OF A PLEA BARGAIN. THE COURT STATED IT WAS NOT AWARE OF ANY PLEA BARGAIN AS TO THE TERMS MENTIONED BY APPELLANT. SUCH NON-INFORMING THE COURT OF A PLEA BARGAIN INVALIDATES SENTENCES. SEE KARGER vs. UNITED STATES 388 F.Supp. 595 (1975). WHILE THE JUDGE MAY NOT HAVE BEEN ENTITLED TO KNOW THE RATIONALE BEHIND THE PLEA BARGAIN, HE WAS ENTITLED TO KNOW THE EXISTENCE OF ONE, AND THE OBLIGATION TO SO INFORM HIM REST ON EITHER COUNSEL. THIS NON-INFORMING PUT BOTH COUNSELS IN AN EMBARRASSING POSITION. SUBSEQUENTLY THEREFORE, NITHER ATTORNEY COULD RECALL SPECIFICALLY WHAT TERMS WERE AGREED UPON, BUT DID INDICATE THAT A BARGAINING DISCUSSION HAD TAKEN PLACE (TR. 4-5 JULY 15, 1975).

THE GOVERNMENT RECANTED THE EXISTENCE OF MAKING ANY PLEA BARGAIN SET WITH TERMS DESCRIBED BY THE APPELLANT (FIVE YEARS). HEARING BOTH ATTORNEYS NOW NEGATIVELY RESPOND CONCERNING TERMS OF A PLEA BARGAIN, ADDED CONFUSION TO PETITIONERS' MENTAL STATE AS TO THE CUSTOMS OF ANNOUNCING SUCH NEGOTIATIONS TO THE COURTS. THIS CONFUSION HAD PETITIONER REPLY TO THE COURTS' INQUIRY TO THE NEGOTIATED PLEA AS ALSO IN THE NEGATIVE. PETITIONER EVIDENTLY MISTOOK THAT THIS WAS THE STANDARD ANSWER TO BE GIVEN TO THE QUESTION, EVEN THOUGH IT WAS REVEALED TO HIM A BARGAIN HAD BEEN MADE. CONSIDER UNITED STATES EX REL SCOTT vs. MANCUSI 429 F 2d. 104 113 N.E. (1970).

RESPONSE TO THE COURTS' QUESTIONS WHEN THE PLEA WAS TAKEN CANNOT UNDER CIRCUMSTANCES, BE SAID TO OVERCOME THE STRONG IMPLICATION THAT PETITIONER WAS TOLD BY ROSENGERG, AND IN FACT BELIEVED THAT A PROMISE OF A (5) FIVE YEAR TERM HAD BEEN MADE. THESE IMPLICATIONS STEMS FROM ROSENGERG ADVISING HIM TO CHANGE HIS PLEA OF NOT GUILTY TO GUILTY, A LETTER (EXHIBIT # 1) SENT BY ROSENBERG AFTER SAID PLEA WAS CHANGED, THE DISMISSAL OF CONNECTED COUNTS IN THE INDICTMENT UNOPPOSED BY THE

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WAS CHANGED, THE DISMISSAL OF CONNECTED COUNTS IN THE INDICTMENT UNOPPOSED BY THE
PROSECUTOR, ALL INDUCED APPELLANT A PLEA BARGAIN HAD BEEN STRUCK AND HE THEREFORE
THINKING IT CUSTOMARY, ANNOUNCED IT TO THE COURT.

A CLEAR CUT STATEMENT BY DEFENSE COUNSEL THAT THE PROSECUTOR HAD MADE A
PROMISE, OR AN AMBIGUOUS REMARK TO WHICH APPELLANT GIVES THE SAME MEANING, HAS
MUCH THE SAME PSYCHOLOGICAL EFFECT ON PETITIONER, APPELLANT AS A PROMIS BY THE
PROSECUTOR. THE EFFECT MAY BE GREATER SINCE PETITIONER IS LIKELY TO PLACE MORE
TRUST IN HIS ATTORNEY THAN IN THE PROSECUTOR. SUCH DISCLOSURE OF A BARGAIN BY

ROSENBERG FOR APPELLANT MAY EVEN SUPPORT A FINDING THAT COUNSEL ACTED SO IMPROPERLY (IF THE IN FACT NO BARGAIN HAD BEEN MADE), THAT FOR CONSTITUTIONAL PURPOSES, PETITIONER WAS DENIED THE RIGHT OF EFFECTIVE COUNSEL. SEE MOBHER vs. LA VALLEE 351 F.Supp 1101 (S.D.N.Y. 1972).

ON THE BASES OF SUCH FINDINGS AND IMPLICATIONS, THE SENTENCE SHOULD BE SET ASIDE BECAUSE IT WAS INDUCED BY MISREPRESENTATION OF COUNSELS TO COMMITMENTS MADE BY THE COURT CONCERNING THE SENTENCE WHICH WOULD BE IMPOSED. IN UNITED STATES vs. SIMPSON 436 F 2d 162 D.C. Cir 1970), IT WAS HELD THAT FALSE REPRESENTATIONS BY DEFENSE COUNSEL AS TO AN AGREEMENT WITH THE COURT CONCERNING SENTENCE WOULD CONSTITUTE IMPERMISSIBLE VERBAL COERCION WHICH WOULD BE REASON TO CONSIDER THE PLEA INVOLUNTARY, SUPPORTING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

THERE IS CLEAR INDICATION OF A PLEA NEGOTIATION HAD BEEN DISGUISED BETWEEN COUNSEL (TR. 4-5 JULY 15, 1975), A CHANGE OF PLEA OCCURED SUBSEQUENTLY AND PETITIONER COUNSEL FORWARD A LETTER IMPLYING SAID CHANGE OF PLEA WAS SUPPORTING BASES OF BARGAIN, WHEREFORE IT WAS ANNOUNCED IN COURT BY PETITIONER AT TIME OF SENTENCING. IN VIEW OF THE ABOVE AND HEREIN, PETITIONER STRONGLY BELIEVES A BARGAIN HAD BEEN MADE WHICH INDUCED HIS PLEA, BUT WAS UNKNOWN TO THE COURT, WOULD CONSTITUTE AN UNKEPT PLEA BARGAIN THAT REQUIRES VACATION OF PRESENT SENTENCE AND THE BEING RE-SENTENCED TO TERM THAT INDUCED PETITIONERS' PLEA IN VIEW OF SUCH CONSIDERATION.

CONCLUSION

WHEREFORE, PETITIONER REQUEST THAT INVIEW OF THE FOREGOING, THAT THIS HONORABLE COURT CONSIDER THE MERITS OF THIS APPEAL ON RECORD OF THE DISTRICT COURT, ALL EXHIBITS AND PAPERS FILED, AND GIVE RELIEF AS SOUGHT.

RESPECTFULLY SUBMITTED:

MILTON MILLS; PRO SE APPELLANT

MILTON M. ROSENBERG

AREA CODE 212
WALKER 5-0770

COUNSELLOR AT LAW

401 Broadway

New York, N.Y. 10013

May 20, 1975

Mr. Milton Mills
Federal Prison Headquarters
427 West Street
New York, New York 10014

Re: Milton Mills v. United States
Of America

Dear Mr. Mills:

I would appreciate your telephoning me the afternoon
that you receive this letter.

I must inform the Assistant United States Attorney as
to our definite decision to plead guilty so that he does not
prepare the case for trial. If he is forced to prepare the
case for trial we cannot expect the same consideration in the
plea and sentence.

Please telephone me so that final arrangements can be
made.

Very truly yours,

MILTON M. ROSENBERG

EEER: lb

EXHIBIT " A "

BEST COPY AVAILABLE

76 Civ. 1116, Milton Mills, Petitioner, v. United States of America
(Pro Se)

ENDORSEMENT ORDER

Petitioner Mills seeks an order vacating the judgment of conviction entered upon his plea of guilty on July 15, 1975. Essentially, the allegations are that there was a plea bargain between defendant and the Government to the effect that if defendant pleaded guilty rather than going to trial, defendant would not be sentenced to more than five years.

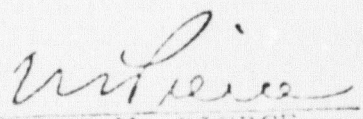
This exact issue has been raised before this Court through a Rule 35 motion which was denied on January 8, 1976. Although that motion was made pursuant to Rule 35, the Court recognized that certain of defendant's claims were in the nature of a § 2255 petition, and the Court treated them as such. In the order denying the application, the Court wrote as follows:

"Having examined the files and records in this case, including the transcript of the sentencing and without reference to the affidavit of the Assistant United States Attorney submitted on this motion--the Court concludes that there is no merit whatsoever to the allegations of Mr. Mills." (United States v. Milton Mills, 75 Cr. 331 (S.D.N.Y. January 8, 1976))

Nothing in the attached petition leads the Court to reconsider its decision on the previous motion. Neither the allegations of the petition nor the letter of his counsel attached can outweigh the substance of the transcript of the sentencing hearing on July 15, 1975, during which hearing the Court inquired into this matter. A further review of that transcript re-affirms the conclusion that the plea was made voluntarily with full knowledge of the possible consequences.

Accordingly, the attached petition pursuant to 28 U.S.C. § 2255 is denied in all respects.

SO ORDERED.



LAWRENCE W. PIERCE
U. S. D. J.

Dated : New York, N.Y.
Sept. 21, 1976

EXHIBIT " B "